

Issue: Misapplication of State Travel Regulations; Hearing Date: 09/11/03;
Decision Issued: 09/12/03; Agency: DCE; AHO: David J. Latham, Esq.;
Case No. 5795



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5795

Hearing Date:	September 11, 2003
Decision Issued:	September 12, 2003

APPEARANCES

Grievant
Three witnesses for Grievant
Human Resource Generalist
Attorney for Agency
Three witnesses for Agency

ISSUES

Did the agency misapply the State Travel Regulations?

FINDINGS OF FACT

The grievant filed a timely appeal after learning that another employee is being compensated for travel under circumstances grievant believes are similar to or the same as his situation. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.¹ The Department of Correctional Education (DCE) (Hereinafter referred to as agency) has employed grievant as a science teacher for five years.

State travel regulations provide that the place or building where an employee performs his duties on a routine basis is designated the "base point."² The employee's "official station" is the area within 25 miles of the base point.³ Employees may not be reimbursed for commuting costs.⁴ The regulations allow DCE to adopt policies or procedures that are more restrictive than the State Travel Regulations.⁵

In the summer of 2001, the agency's assistant superintendent of operations asked two teachers if they would be willing to volunteer to teach every other day at an agency facility located 32 miles from their base point. Both teachers (and grievant) had been employed since their hire at an agency facility located just outside a major metropolitan area. The two teachers asked for permission to use a state-owned vehicle or alternatively, to be reimbursed for mileage. The assistant superintendent told them that was not possible. He also advised them that the assignment was temporary although the duration was unknown at the time. The two teachers agreed and began to work every other day at the other facility in September 2001. Both were formally assigned to two work locations (base points) – their existing base point, and the other facility located 32 miles away.⁶

In January 2002, the principal of grievant's school announced that he was looking for a volunteer to replace one of the two teachers who had been temporarily working for five months on an every-other-day basis at the agency facility located 32 miles from the base point. Grievant expressed interest and

¹ Exhibit 7. Grievance Form A, filed April, 24, 2003.

² Exhibit 4. Office of the Comptroller *State Travel Regulations*, October 1, 2002. Definition of Base Point: "Place, office or building where the traveler performs his/her duties on a routine basis. When an employee travels frequently to one or more locations within a metropolitan area or geographical region, multiple base point assignments may be appropriate."

³ Exhibit 4. *Ibid.* Definition of Official Station: "The area within a 25-mile radius of an employee's designated base point."

⁴ Exhibit 4. *Ibid.* Definition of Commuting Status: "Period of time in which an employee is routinely traveling between his residence and his base point. Mileage and other commuting costs incurred during commuting status are considered a personal expense and are not reimbursable. When an employee has multiple base points, commuting to any of these on a scheduled workday is not a reimbursable expense."

⁵ Exhibit 4. "Executive Branch agencies are authorized to adopt more restrictive policies and procedures as approved by the Agency Head."

⁶ Exhibits 1 & 2. Letters to each teacher from Assistant Superintendent, August 30, 2001.

discussed the matter with the principal. The principal advised grievant that he would be working every other day at the other facility, that the assignment was temporary (duration unspecified), and that he would continue to be under the principal's supervision for all administrative purposes. Grievant knew that the teacher he was replacing did not have a state-owned vehicle, and that she was not receiving mileage reimbursement. Grievant nevertheless asked the principal if he could have a state car or be paid mileage reimbursement; the principal told him that was not possible. Grievant thought the situation over for a day or two and then advised the principal that he would be willing to volunteer for the temporary assignment.

Grievant performed teaching duties at the other facility from January 29, 2002 through June 21, 2002 under the temporary, volunteer arrangement.⁷ He traveled back and forth to the facility on 46 workdays. Almost one year later, in April 2003, grievant learned that a guidance counselor, who was assigned to the same base point as grievant, had begun working at the other facility in March 2003. He also learned that the guidance counselor had been assigned a state-owned vehicle that she used to commute back and forth to the other facility. Grievant then filed his grievance requesting mileage compensation.

The guidance counselor had been asked to temporarily fill in for a guidance counselor at the other facility. The counselor at the other facility had taken short-term disability (STD) leave beginning March 4, 2003 and was off work until July 10, 2003.⁸ The position of an employee on STD must be held open for up to six months.⁹ Since the agency was unable to fill the absent employee's position, it was unable to assign the guidance counselor a second base point at the other facility. The agency allowed the guidance counselor to use a state-owned vehicle for travel to the other facility because her work there was full-time (every day), because she could not be assigned to that base point, and because the work was expected to be temporary.¹⁰ She has been working every day at the other facility since March 2003.

⁷ Grievant was permanently transferred to the other facility on June 12, 2002. See Exhibit 6. Letter to grievant from Assistant Superintendent, June 12, 2002. However, grievant requested and was granted a return to his first facility in July 2003.

⁸ He returned to work briefly and then went out again on STD beginning in August 2003 in order to have surgery.

⁹ If the employee is unable to return to work after six months, the employee is placed on long-term disability (LTD). Once an employee is placed on LTD, he is considered an inactive employee and the agency may fill the position with someone else.

¹⁰ Exhibit 8. Section VIII.B., Department of General Services, Office of Fleet Management Services, Rules and Regulations Manual provides for reimbursement from employees who use fleet vehicles for commuting. "All employees authorized to use a fleet vehicle for commuting shall reimburse the state for mileage unless they are law enforcement officers or employees who do not report to an official work station and whose office is in their home." As the guidance counselor does not qualify under either of the two exceptions noted, she is required to reimburse the state for commuting mileage. Neither party offered evidence as to whether the guidance counselor has been reimbursing the state for commuting mileage as required.

When the agency reimburses employees for the use of their personal vehicle for agency business, the Commonwealth's established mileage rate is \$0.325 per reimbursable mile. Grievant calculated that he drove a total of 2,944 miles while traveling to and from the other facility over 46 days.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹¹

Grievant seeks mileage reimbursement because of his perception that another employee has been compensated for her daily commute to work by being allowed to use a state-owned vehicle. The issue herein is whether the State Travel Regulations have been applied correctly. The evidence focused on how those regulations were applied to four employees, one of whom is the grievant.

Three employees, including grievant, were not reimbursed for mileage or allowed to use a state-owned vehicle during the several-month period that they worked every other day at a facility 32 miles from their base point. In each case,

¹¹ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

the three employees were asked to volunteer to work at the other facility, and each agreed to do so. The employees were officially reassigned to work at both facilities. Each of the three asked about the possibility of reimbursement or state vehicle use and each was advised that was not possible. Despite that knowledge, each agreed to volunteer for the assignment. Each worked only 50 percent of the time at the other facility – on an every-other-day basis.

The fourth employee was requested to work at the other facility because the agency had no choice but to have a guidance counselor at the facility in order to meet accreditation requirements. She could not be officially reassigned to the other facility because the position she temporarily filled had to be held open for the incumbent – an employee on disability leave. The guidance counselor has been working full time at the other facility, not half-time. Thus, the agency has drawn three significant distinctions between grievant's situation and that of the guidance counselor.

The grievant may not agree that the differences above justify the agency's decision. However, the agency has demonstrated that its application of the policy in his case was the same as for the other two similarly situated employees. More importantly, grievant has failed to demonstrate that the agency has misapplied the State Travel Regulations. The agency is permitted to adopt its own travel procedures that are more restrictive than the state policy as long as such procedures are in compliance with state policy.

Grievant points out, and his principal agrees, that he has always been a team player and always helps out when asked to do so by the principal. He agreed to help at the other facility because he felt that doing so might reflect poorly on him. He also knew that the teacher he was replacing was displeased about having been there for several months; grievant felt that he would be doing her a favor to replace her. While all of grievant's motivations were commendable, the fact remains that grievant *volunteered* to take this assignment. The agency did not coerce him or suggest that volunteering was mandatory. In fact, it was grievant who voluntarily went to the principal after a general feeler was put out to all teachers.

DECISION

The grievant has not shown, by a preponderance of evidence, that the agency has misapplied the State Travel Regulations by denying him mileage reimbursement or the use of a state-owned vehicle. Therefore, the relief requested is hereby DENIED.

A hearing officer does not have authority to take action against another employee. Therefore, the hearing officer can take no action with respect to the guidance counselor. However, the hearing officer recommends that the agency

take the action necessary to assure that the guidance counselor is in compliance with the DGS Fleet Management rule that requires her to reimburse the state for commuting mileage.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹² You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

¹² An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer